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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 638, 639 and 641

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees.*

CITY OF TAMPA, FLORIDA, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees.*

SOUTHERN RAILWAY SYSTEM, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM OF APPELLEES SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE ATLANTIC COAST LINE COMPANY, AND MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY

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Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company, pursuant to Rule 16 of the Rules of this Court, move that the judgment of the District Court be affirmed with respect to the questions raised by the appeals in Nos. 638, 639 and 641, on the ground that the questions raised by the appellants are so clearly lacking in substance as not to warrant further briefing and oral argument.[1]

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[1] Hereinafter, short name forms will sometimes be used as follows: The merger applicants will be called "Seaboard" and "Coast Line";

QUESTION PRESENTED

Whether the Interstate Commerce Commission acted within its statutory powers under § 5(2) of the Interstate Commerce Act in finding that the merger of Seaboard and Coast Line, subject to the conditions prescribed, would be consistent with the public interest.

STATEMENT

Seaboard and Coast Line are interstate railroads. Each operates only in the six states of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida.

In May, 1960, the directors of Seaboard and Coast Line agreed to a Plan of Merger for the merger of Coast Line into Seaboard. The Plan was thereafter overwhelmingly approved by the stockholders of each company.

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the carrier to result from the merger will be called the "Merged Carrier"; the Interstate Commerce Commission will be called the "Commission"; the Southern Railway System, consisting of the Southern Railway Company and its subsidiaries and affiliates, will be called the "Southern"; the Florida East Coast Railway Company will be called the "FEC"; the City of Tampa, Florida, will be called "Tampa."

References such as "Southern 10" are to pages of the indicated jurisdictional statement filed by the three appellants, FEC, Southern and Tampa. References to "Tr." and to "Ex." are to the Reporter's Transcript and the Exhibits forming a part of the record before the Commission. References to "Ex. Rep." are to the Hearing Examiner's Report, on file with this Court as Appendix II to our Jurisdictional Statement on the prior appeal of this case, No. 425, O.T. 1965. Page references are to the indicated folio pages ("fol.") of the Report, *not* to the printed page numbers in that Appendix. We have filed nine additional copies of the Appendix containing the Examiner's Report for the convenience of the Court. Nine printed copies of the Commission's Report, paginated as in 320 I.C.C., are also being filed.

Proceedings before the Commission.—Seaboard and Coast Line jointly applied in July, 1960, for authority to merge pursuant to § 5(2) of the Interstate Commerce Act. Eighty-six parties who filed 166 pleadings participated in the extensive ensuing proceedings before the Commission. Hearings were held before an Examiner in seven cities in the Southeast on 35 hearing days between November, 1960, and July, 1961. The record of those hearings contains 5,729 pages of reporter's transcript, 101 prepared testimony statements containing 1,221 pages, and 271 documentary exhibits.

More than a year after the close of the hearings, and after receiving briefs, the Examiner, on August 24, 1962, issued an extensive report and recommended order approving the merger upon certain prescribed conditions. Exceptions and replies were filed with the Commission by various of the parties.

On May 7 and 8, 1963, the case was argued orally before the full Commission. On December 13, 1963, the Commission issued and served an exhaustive report,[2] dated December 2, 1963, setting forth in detail the Commission's reasons for approving the proposed merger, subject to certain specified conditions.

The Commission's report, among the other public interest factors, extensively analyzed the competitive factors inherent in the proposed merger, recognizing at the outset of its discussion the obvious fact that: "The proposed merger would result in the elimination of present competition between Seaboard and Coast Line in a 6-state area." (320

[2] In printed form the Commission's report itself covers 148 pages, and the report of the Examiner, which the Commission's Order incorporates by reference (App. B, p. 6a, *infra*), in the form in which we printed it in the Appendix on the prior appeal of this case, covers 268 pages, including appendices.

I.C.C., at 163) The Commission proceeded to a full analysis of the "intramodal" (rail) competition as it would be affected by the merger. First, it analyzed the quantum of the total competitive tonnage of the two roads and the portion of that tonnage that would remain subject to competition from other rail carriers after the merger.[3] The Commission observed that, in terms of points where the merging roads had agents, "there would be only 17 communities outside of Florida which would be without competitive rail service after the merger, and these communities have an average population of approximately 6,500 each." (320 I.C.C., at 164)

The Commission noted that: "Though the merged company will be the biggest railroad in the area, whether measured in terms of revenues, or assets or mileage, it will encounter vigorous competition from other rail carriers. The record here shows that rail competition will exist at every major city with a population in excess of 200,000 except at Tampa." (320 I.C.C., at 164) The Commission further noted that the situation at Tampa and in central and western Florida generally was unique since those areas were served by no other railroads besides the merger applicants. However, within this framework of local, origination-point competition, the Commission analyzed the peculiarities of the Florida situation in that in terms of points at which Seaboard and Coast Line had maintained agents "the number of Florida points at which there has been no competition [between the two carriers] is about 4 times as great as the number of Florida points at which

[3] The Commission noted that 33.4% of the total tonnage of Seaboard and Coast Line was competitive between them. Of this competitive portion of the two railroads' tonnage, over 65% would remain competitive with other railroads after the merger. (320 I.C.C., at 211)

Seaboard and Coast Line have heretofore competed." (320 I.C.C., at 165)

Observing that: "The impact of this merger, both good and bad, will be felt throughout the southern region and in evaluating its competitive advantages and disadvantages, we must consider the rail service provided by all rail carriers and, in fact, the sum of all of the competitive transportation facilities that will remain available in this broad area" (320 I.C.C., at 166), the Commission analyzed the competitive effects of the merger in terms of both intramodal competition and in terms of competition with transportation provided by competing forms of carriage.

The Commission considered the growth of competition due to government subsidies to highway, water, and air carriers; the constant decrease in the proportion of intercity traffic handled by rail and the corresponding increase of traffic by other modes; the increase in truck registrations; the increase in air passenger travel; the increase in tonnage handled by the ports in the territory of Coast Line and Seaboard; the increase in products carried through pipelines; the respective motor tonnages and rail tonnages at 21 representative points in the Southeast; the particular inroads made by trucks in the movement of perishable commodities; the increase in waterborne traffic at the port of Tampa, largely competitive for the heavy, bulk-loading commodities with rail carriage, and the decline of rail revenue on traffic at Tampa. (320 I.C.C., at 150-53)

Against this backdrop, the Commission noted the declining income of Seaboard and of Coast Line, and the problems associated with their increased operating costs and the problem of their excess "plant" capacity. The Commission reviewed the economies—so relevant to modern, effi-

cient service—to flow from the merger. Meticulously analyzing and to a considerable extent reducing the estimates of economies made by the merger applicants, it nonetheless concluded "that the total savings will be substantial and will approximate our estimate of at least $20 million a year." (320 I.C.C., at 159) The Commission concluded that: "In the light of these and other factors, particularly the accelerated growth of external competition, it is evident that, following the merger, there will be greater assurance of the ability of these railroads to provide efficient, adequate, and improved service to the public in the future." (320 I.C.C., at 153)

The Commission, recognizing that the real competition in the rail industry is "route competition" for the revenue-producing long haul, used its administrative powers to balance the competitive situation with respect to the Southern —the principal rail competitor of Seaboard and Coast Line. This was done with particular reference to the long-haul on traffic that would be originated in central and western Florida,[4] where the merger's effects on intramodal origination-point competition were obviously most pronounced. The Commission recognized that tariffs presently in effect prevent routing over Southern's lines north of Jacksonville on certain traffic to and from Florida points on Seaboard and Coast Line. (320 I.C.C., at 182) The Commission accordingly ordered the Merged Carrier to establish, in conjunction with Southern, joint rates on traffic through the Jacksonville gateway, even though this would compel the Merged Carrier to "short haul" itself and lose the beyond Jacksonville movement of this traffic. These rates

[4] Southern's operations in Florida do not extend south of Jacksonville and Palatka which are, of course, in the northeast corner of the state.

were to be no higher than the rates applicable over the lines of the Merged Carrier itself, through the Jacksonville gateway, or via any other gateway. The Commission stated that this requirement (Condition 8, App. A, pp. 2a-3a; App. C, p. 12a, *infra*) would make Southern "fully competitive with the merged company with respect to northbound traffic out of Jacksonville." (320 I.C.C., at 182) Certain other conditions were imposed to insure the ability of other rail carriers to compete effectively with the Merged Carrier, and thus to provide the public the advantages of balanced competitive rail service.[5]

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[5] Thus, in order to ensure the maintenance of balanced competition after the merger:

(a) The Merged Carrier was required to give the Central of Georgia (a Southern affiliate) trackage rights over the present line of Coast Line from Albany to Tifton, Georgia. This would give Central of Georgia and Southern a continuous route from Birmingham and Montgomery to Jacksonville, and when considered with the condition opening the Jacksonville gateway, the Commission concluded, would not only "be particularly beneficial to Southern and Central" but "also provide a significant volume of interchange trackage for [Florida] East Coast at the Jacksonville gateway." (320 I.C.C., at 183) (Condition 12; App. A, p. 4a, *infra*)

(b) The Coast Line and Seaboard each operate a line between Jacksonville and Quinlan, Florida, an industrial area which includes a large plant of the St. Regis Paper Company. St. Regis and Southern, in order to keep service at Quinlan competitive, requested that the Merged Carrier be required to sell or lease one of the two lines to Southern, and the Commission imposed this condition. (Condition 11; App. A, p. 4a, *infra*)

(c) The Merged Carrier was required by the Commission to open new routes with the Norfolk Southern Railway, an east-west carrier operating primarily in Southern Virginia and North Carolina. The Merged Carrier was ordered to open new routes and maintain joint routes with Norfolk Southern through the Wilson, N. C., Fayetteville, N. C., and Raleigh, N. C., gateways. (Condition 7; App. A, p. 2a, *infra*)

In addition, among other conditions, there were imposed on the Merged Carrier general traffic conditions ordering the maintenance of all routes and channels of trade via existing junctions and gateways; ordering preservation of neutrality in handling traffic; ordering preservation of present traffic and operating relationships with

The Commission stated that it expected "positive results to flow from consummation of this merger subject to the described conditions." The Commission stressed, "it is important to note that the conditions we have devised represent neither mere acceptance of the minimum concessions offered by the applicants nor full acquiescence in the demands of the intervening railroads, but rather are the product of our exhaustive study of the competitive situation in the Southeast. We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation." (320 I.C.C., at 188)

Balancing the factors, the Commission decided that its conditional authorization of the proposed merger would be consistent with the public interest, and, accordingly, made the finding to that effect required by § 5(2) of the Interstate Commerce Act. The Commission concluded:

> "In our determination, we are required to give consideration to the effect that the merger would have upon competitors and on the general competitive situation in the railroad industry in the light of the objectives of the national transportation policy. *McLean Truck-*

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connecting lines; imposing an obligation to handle the cars of other lines without discrimination; prohibiting interference with the right of industries to select their own routing for traffic; ordering the maintenance of existing freight train schedules, so as to preserve connections with other railroads; and allowing Southern to abandon certain trackage agreements with the Merged Carrier which might prove to be burdensome to it. (Conditions 1, 2, 3, 4, 5, 6, 9 and 10; App. A, pp. 1a-4a)

We set forth the text of the conditions imposed as Appendix A, pp. 1a-5a, *infra*, and the Order amending one of them as Appendix C, pp. 10a-12a, *infra*.

ing Co. v. *United States, supra.* We have carefully evaluated the effects of the curtailment of competition that will result from the merger, and, when considered in connection with the advantages of the merger, including improved service, safer operations, and lower costs, we are convinced that the advantages of the merger far outweigh the potential disadvantages." (320 I.C.C., at 212)

Two commissioners dissented from the order of conditional approval, essentially on the theory, later espoused by the District Court in its first opinion, that the Commission erred through its "failure to make one critical finding; viz., whether or not the proposed merger, but for section 5(11) of the Interstate Commerce Act, would run afoul of section 7 of the Clayton Act." (320 I.C.C., at 226)

On reconsideration, the Commission modified one of the routing and gateway conditions and otherwise denied reconsideration, on March 4, 1964. (See App. C, pp. 10a-12a, *infra*)

The judicial review proceedings.—On March 18, 1964, FEC filed a complaint to set aside the Commission's orders, and a temporary restraining order issued. Southern and the Railway Labor Executives' Association were granted leave to intervene as plaintiffs; the Justice Department, answering for the statutory defendant United States, aligned the United States as a plaintiff. Seaboard, Coast Line, and The Atlantic Coast Line Company and Mercantile-Safe Deposit and Trust Company[4] intervened as de-

[4] The last two companies are companies in control of Coast Line. Various issues as to their status were raised before the Commission, and pursued to some extent in the judicial review proceedings; those issues have now been abandoned by appellants. No question relating to these companies has been preserved in the Jurisdictional Statements. See FEC 3; Tampa 4-5; Southern 5-6.

fendants. On May 13, 1965, the District Court entered an opinion and judgment setting aside the orders of the Commission. (242 F. Supp. 14; FEC 54a-70a) The District Court set aside the orders because it concluded that the Commission's analysis of the competitive effects of the merger was fatally defective, since the Commission had not made certain determinations and findings. Those supposedly lacking determinations and findings were whether, by reference to the relevant product and geographic markets, the merger violated § 7 of the Clayton Act.

On appeals by the Commission and by the Seaboard and Coast Line,[7] this Court unanimously and summarily vacated the judgment of the District Court. *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154 (1965). This Court held that the District Court erred in its interpretation of the proper standards to be applied by the Commission in passing upon a rail merger proposal under § 5(2) of the Interstate Commerce Act. It emphasized that the teachings of its decisions in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), and *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959), remained in effect. It accordingly remanded the case to the District Court to perform the normal judicial review functions.

After performing those functions, on June 8, 1966, the District Court, in a lengthy opinion (FEC 2a-50a), after an exhaustive analysis of the Commission's action, sustained the Commission's orders. The District Court concluded that

> "the ICC explained its reasoning and supported its application of that reasoning by substantial evidence.

[7] And by the Coast Line's two controlling companies.

> Since the ICC correctly applied the proper standards and thus exhibited that familiarity with the complex problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experience, we must and do sustain its order." (FEC 50a)

From that judgment, FEC, Southern and Tampa[a] have appealed to this Court.

ARGUMENT

I. THE COMMISSION CORRECTLY APPLIED THE STANDARDS TAUGHT BY THIS COURT IN PASSING ON THE MERGER. IT ESTIMATED THE SCOPE AND APPRAISED THE EFFECTS OF THE CURTAILMENT OF COMPETITION WHICH WOULD RESULT, AND CONSIDERING THIS WITH THE ADVANTAGES TO FLOW FROM THE MERGER ACTED WITHIN ITS POWERS IN FINDING THAT THE MERGER, SUBJECT TO THE CONDITIONS WHICH IT PRESCRIBED, WOULD BE CONSISTENT WITH THE PUBLIC INTEREST.

The standards by which a proposed rail unification is to be judged by the Commission under § 5(2) of the Interstate Commerce Act—and the limits within which the Commission's judgment is to be reviewed by the courts—have been laid down and reiterated by this Court:

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[a] Tampa was, after supporting the merger before the Commission, permitted to intervene in opposition to the merger before the District Court on remand.

The Railway Labor Executives' Association and the Brotherhood of Locomotive Engineers have in No. 640 appealed to this Court with respect to certain issues concerning the scope and application of the labor-protective conditions imposed by the Commission upon the merger. This Motion to Affirm does not relate to that appeal.

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' . . . 'The wisdom and experience of that Commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest' . . . ." *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87-88 (1944).

In *McLean,* the Court made it plain that "in authorizing those consolidations [under § 5(2) of the Interstate Commerce Act] it [Congress] did not import the general policies of the anti-trust laws as a measure of their permissibility." *Id.,* at 85. And, more recently, in *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959), this Court reiterated and entirely reaffirmed the standards governing Commission action set forth in *McLean.* It reiterated that the Commission's power under § 5 is—as that section provides—"exclusive and plenary"; that while "the preservation of competition among carriers [is] . . . still a value," it is "significant chiefly as it aids in the attainment of the objectives of the national transportation policy"; and that the Commission "is not to measure proposals for [acquisitions] by the standards of the antitrust laws." *Id.,* at 185.

Again only last Term, in the prior appeal in this case, this Court expressly reaffirmed the teachings of *McLean* and *Minneapolis. Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965). There, this Court declared that:

> "The same criteria [as set forth in *McLean* and *Minneapolis*] should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.'" *Id.*, at 156-57.

The basic thrust of FEC, Southern and Tampa in urging this Court to devote its time to a plenary hearing on further review of the voluminous record made before the Commission in this matter is essentially: First, that this is an important railroad merger case and the first of the "current wave" to be presented to this Court (Southern 19; FEC 9-10; Tampa 18); second, that it is important for this Court to fix the applicable legal standards governing the Commission's approval of rail mergers and "to decide the standards to be applied when appraising the anticompetitive effects of these proposed mergers" (Tampa 18; see Southern 20; FEC 9-10); and, finally, that because of what the appellants contend to be the importance of this merger, the "ultimate issue of public interest under the Interstate Commerce Act should be resolved by this Court." (FEC 15)

Each of these broadly-brushed contentions articulates the same fallacy—appellants' refusal to recognize that Congress vested the determination as to the issue "of public interest under the Interstate Commerce Act" in the

Commission, not in the courts. "It is not true . . . that . . . 'the courts must, in a litigated case, be the arbiters of the paramount public interest'. This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-36 (1946). In essence, the appellants are simply seeking to retry *de novo* in this Court, as they sought unsuccessfully to retry in the District Court, the issues of the proper accommodation of the competitive factors with the ultimate public interest standard which were vested by law in the Commission to determine, and which, after full participation by appellants, the Commission did determine here.

Appellants' suggestion that it is important for this Court to settle the governing legal principles to be applied by the Commission in a railroad merger comes rather late in the day. That is what this Court did in the *McLean* case; that is what it did again by reiterating those principles in the *Minneapolis* case; and that is what it did once again last Term in this very case by unanimously and summarily vacating the earlier decision of the District Court which had departed from those principles. It is difficult to see what further elucidation of the principles three times laid down by this Court is required.

Likewise, the appellants' insistence upon the intrinsic importance of this merger and the fact that it was, when decided by the Commission, the first of a number of then-pending rail unification cases before the Commission, is irrelevant to the question whether this Court should devote its attention to a plenary review of the Commission's decision. The importance of the merger was one of the reasons why it had extraordinarily careful attention before

the Commission; it is not a reason for this Court's review in the absence of a demonstration of some respect in which the Commission acted beyond its powers or failed to perform its statutory duties as taught by the decisions of this Court.

And, in point of fact, this case is no longer—to a great extent, perhaps, due to the delays attendant upon the efforts of appellants—the "first" of any group of important rail unification cases. In a number of rail merger and control cases, Commission approval has been granted and there is no remaining opposition related to the issue of the accommodation of the competitive factor and the public interest. See *Norfolk & W. R. Co. and New York, C. & St. L. R. Co.—Merger,* 324 I.C.C. 1 (1964) (merger consummated); *Chesapeake & O. R. Co.—Control—Baltimore & O. R. Co.,* 317 I.C.C. 261 (1962), *order sustained sub nom. Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F.Supp. 19 (E.D. Mich. 1963), *aff'd,* 375 U.S. 216 (1963) (transaction consummated); *Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co.,* ICC Fin. Dkt. No. 21755 (1963), *order sustained sub nom. Illinois Cent. R. Co.* v. *United States,* N.D. Ill., No. 65-C-1393, August 4, 1966, *appeals docketed,* Nos. 687, 688, 689, O.T. 1966 (court review not involving competitive factor); *Pennsylvania R. Co.—Merger—New York Cent. R. Co.,* 327 I.C.C. 475 (1966), *injunction denied sub nom. Erie-Lackawanna R. Co.* v. *United States,* S.D.N.Y., 35 U.S.L.W. 2203, October 4, 1966, *review granted,* 35 U.S.L.W. 3149, October 18, 1966, Nos. 642, 680, 691, O.T. 1966 (court review not involving competitive factor). In other important merger and control cases, the Commission has disapproved the proposed transaction. See *Southern Pac. Co.—Control—Western Pac. R. Co.,* ICC Fin. Dkt. No. 21314 (1965); *Great Northern Pac. & Burlington Lines, Inc.—Merger,*

ICC Fin. Dkt. No. 21478, decided March 31, 1966. Each case is adjudicated by the Commission on its own facts, under the legal principles reiterated by this Court. Certainly, then, while the importance of this case as a Commission case might have suggested to certain of the interests now complaining of the Commission's decision to have been more attentive to the Commission's hearings than they were,[9] plenary review of it by this Court—particularly in the light of the District Court's exhaustive judicial review and this Court's prior reiteration of the governing standard—is not now important or required.

II. THE SPECIFIC ATTACKS ON THE COMMISSION'S FINDINGS ARE BASELESS.

In those few places where the appellants deign to be specific in their complaints as to the Commission's action, they essentially engage in literary criticism of the Commission's report. In form, their attacks are on the adequacy of the Commission's findings. But, indeed, it would be a rare case where appellate counsel could not conjure up scores of additional findings which the Commission could have made. The process is facilitated, of course, in a case like the present where the appellants do not recognize that there is any requirement that they request the administrative agency to make findings in specific areas before complaining in court that the agency failed to make such findings.[10] —The short answer is that, as this Court

[9] See n. 10, *infra*.

[10] The appellants are stung by the District Court's insistence that issues be raised before the Commission before being submitted to the court on judicial review. (Southern 38-40) Perhaps this view of the judicial review proceedings as a trial *de novo* was what prompted the Antitrust Division, also, to attend the administrative hearings only on five days out of 35, and, after requesting a special session of Commission hearings in Washington, D. C., for it to produce its evidence, to fail to produce any evi-

has observed, the Commission is not required to make detailed findings; it is required simply to make the basic ones "essential to the statutory validity of an order", and to disclose "in its report" "the essential basis of its judgment." *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216, 228 (1951). Indeed, of course, here the Commission's report in fact is detailed and exhaustive and plainly points out the essential basis for its judgment.

The unspoken major premise of most of the appellants' claims of the inadequacy of the Commission's findings is simply a thinly disguised harkening back to the erroneous theory which they were able to induce the District Court to accept in its first decision: That the Commission was required to make findings of the sort which would be required in an antitrust case under § 7 of the Clayton Act.—Indeed, from time to time the appellants expressly let slip out their persistence in the approach which this Court last Term unanimously rejected. Thus, Tampa declares: "The Commission did not fulfill its obligation to make adequate findings partly because the administrative hearing record it compiled does not contain the data from which it could validly deduce all the relevant geographic and product markets and submarkets. . . ." (Tampa 16) —But this will-of-the-wisp chase after each and every product and geographic market and submarket is the very approach which this Court rejected last Term.

We will reply to the specific deficiencies with which the appellants seek to charge the Commission's report.

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dence. (FEC 39a) While, to be sure, the essential statutory findings must be made, whether or no any party requests them to be made, it would be a stultification of the administrative process to say that the Commission was required to make findings on a host of diverse points when never requested to by the parties before it, simply in the light of a retrospective argument in court.

1. *The Benefits to the Public.*—The appellants contend that the Commission overstated the benefits to be derived from the merger; that it mistook private benefits to the merger applicants for benefits to the public; and that it concentrated solely on the savings to the Merged Carrier to result from the merger, and that, on the basis of such savings, any merger could be justified no matter what the effect on competition. On this basis, the appellants suggest that the Commission improperly weighted the scales against competition.[11] (FEC 10-14; Southern 10, 24-27)

But the fact of the matter is that the Commission expressly recognized that its decision was not predicated "upon the financial gains that may accrue to the stockholders of the merged company" (320 I.C.C., at 161) but "primarily on the beneficial effects this proposed merger will have upon rail patrons and the public generally." (*Ibid.*) Despite the appellants' claims, the Commission did not look simply to the savings resulting from the merger for the ultimate public benefits to be obtained; it found them also in the rationalization and improvement of service to be expected, in the form of "increased efficiency of operations, more flexible and regular schedules, faster service, increased supply of boxcars, elimination of switching charges, and reduction of freight costs by reason

[11] In connection with this argument, one of the appellants finds it necessary to misquote the District Court. It is stated that the District Court held that the factors specified in § 5(2)(c) of the Act were to be given weight over and above the competitive considerations. (FEC 9) But what the District Court held, in the passage cited by the FEC, was that the Justice Department's argument, to the effect that healthy competitors should never be allowed to merge, was "equivalent to loading the scales in favor of but one factor", the competitive factor. (FEC 37a) The District Court properly stated that: "This argument cannot, as a matter of law, be used to rewrite the statute." (FEC 36a)

of single-line rates . . . ." 320 I.C.C., at 159. Also found by the Commission was the reasonable expectation of improved service in the form of "better distribution of special freight cars"; "broader transit privileges"; "improved and expeditious freight schedules between the principal terminals"; "more flexible schedules and more direct routes"; "the elimination of interchanges and delays in transit"; "the simplification of transit arrangements and greater flexibility in arranging stop-off points"; "substitution of single-line rates on certain commodities"; "elimination of certain switching charges"; "more adequate car supply"; "availability of more specialized equipment"; "more efficient utilization of equipment"; "convenience in the settlement of claims and the tracing of cars"; and "promotion of new industrial sites, improvements in port terminal facilities and in the stabilization of employment which will flow from the greater financial stability of the merged company." 320 I.C.C., at 160-61. And there were a host of other benefits found in the Examiner's Report, adopted by the Commission. Ex. Rep. fol. 123-25; see App. B, p. 6a, *infra*.

Appellants understandably do not mention these findings; but they relate to the raw material out of which improved transportation service and the fulfillment of the national transportation policy must come; and they are voluminously supported on the record. It was, indeed, clear not only to the Commission but to the overwhelming majority of the shippers in the area served by Seaboard and Coast Line that the merger would be to the public's advantage in terms of service. As the Commission found: "The merger proposal has the support of a substantial majority of . . . shippers . . . . From the standpoint of tonnage, shippers representing approximately 90 percent of the total Sea-

board-Coast Line tonnage endorsed the merger." 320 I.C.C., at 162-63.[12]

Moreover, the Commission's findings as to the beneficial effects of the economies of the merger, and their relationship to the public interest, are also articulated and amply supported. The Commission, heavily discounting the initial estimates of the applicants, concluded that the merged operation could effect economies of at least $20,000,000 per year. (320 I.C.C., at 159, 207) The Commission made it clear that, as a regulatory agency, it would make these savings redound to the benefit of the public. See 320 I.C.C., at 167, 207. It was not, as the Commission made it clear, from the stockholders' point of view that it gave weight to the economies to be effected. (320 I.C.C., at 166) As the Examiner's Report—adopted by the Commission—pointed out, the savings and the improved service to the public are inextricably bound up. The economic savings to be yielded by the proposed merger would produce a better transportation plant,[13] providing more efficient railroad service to the public. (Ex. Rep. fol. 134) —In short, the question of savings is a fundamental element the Commission looks

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[12] Even the shippers at Tampa, where the merger, as the Commission recognized, would create certain special problems (see pp. 24-29, *infra*), indicated overwhelming support for the merger. Nineteen Tampa shippers testified in support of the merger before the Examiner invoked the cumulative evidence rule, excluding some 47 others who were awaiting the opportunity to testify in support. Only four shippers, infrequent rail users, testified to the contrary. Tr. 1768-2090; 2243-66; 2044-45; 2118-22; 2266; 2315; 2337; 2352. See 320 I.C.C., at 165.

[13] A related advantage to the public is the ending of the economic waste that is inherent in the gross underutilization of the plant of the merger applicants. The record indicated that Coast Line today is operating at no more than 25% of its capacity on the main line, and that traffic could be doubled or tripled with no difficulty whatsoever in handling it. Tr. 1458-59.

to and examines in all rail merger proceedings. The Commission has always applied and examined the concept of savings in the light of the goal of "adequacy of transportation service . . . economy and efficiency, and . . . appropriate provision and best use of transportation facilities." *Louisville & N. R. Co. Merger,* 295 I.C.C. 457, 502-03 (1957). This Court has recognized the relevance of savings to the standard of § 5(2). *McLean Trucking Co.* v. *United States, supra,* 321 U. S., at 87. Savings make common carriers stronger and better servants of the public. The merger savings here, as the Commission found, will greatly aid in developing new and modern railroad technology, adequate car supply, specialized equipment, rate reductions, industrial development services, and other advantages to the shippers and the public. See 320 I.C.C., at 160-61; Ex. Rep. fol. 136.

In this connection, the Commission, aware that marginal returns do not assure reliable carriers, noted the minimal returns earned by Seaboard and Coast Line on their operations.[14] In the two most recent years considered, Seaboard's rates of return were 3.84% and 4.65%, and Coast Line's were 2.39% and 3.52%. The Commission made the obvious finding that such rates of return do "not compare favorably with returns on investments in other industries or in other modes of transport." (320 I.C.C., at 149) The Commission very properly took the low rate of return into account, together with the extensive intermodal competition to which the railroads in general and these carriers

[14] Of course, the Commission has uniformly ruled, as here, that carriers need not be on the brink of bankruptcy to merge. *Pennsylvania R. Co.—Merger—New York Cent. R. Co.,* 327 I.C.C. 475, 494-99 (1966); *Great Northern Pac. & Burlington Lines, Inc.—Merger,* ICC Fin. Dkt. No. 21478, decided March 31, 1966, mim. p. 90; *Norfolk & W. R. Co. Merger,* 307 I.C.C. 401, 407, 441 (1959); *Louisville & N. R. Co. Merger,* 295 I.C.C. 457, 464, 482 (1957).

were subjected, as the Commission extensively found. (320 I.C.C., at 149-53, 210)

Obviously, not every railroad merger could produce such a showing, despite the suggestions of the appellants. Nor is it an adequate treatment to say, as appellants do (FEC 10), that savings are simply the other side of the coin to the elimination of competitive and hence duplicative facilities, and to the elimination, with them, of competition. For one thing, the amount of savings in the elimination of duplicating service between two carriers serving the same region will be the same regardless of whether there is a third, remaining carrier serving the region; but here the Commission relied extensively on the fact that substantial rail competition would remain for the merged carrier throughout its system, except within one problem area, to which the Commission gave special attention. Or, to take another example, in an end-to-end merger between a "bridge" carrier, strategically located, and one of a number of connecting onward carriers, there will be extensive elimination of competition but little savings. —Therefore, it is patently erroneous to charge, as do appellants, that the benefits which the Commission found were purely the results of the destruction of competition, and that accordingly the Commission weighted the scales against competition, and applied an approach which inevitably led to approval. Where the Commission finds that the benefits of a merger do not outweigh the consequences to competition, it shows no hesitancy about denying its approval. *Great Northern Pac. & Burlington Lines, Inc.,—Merger,* ICC Fin. Dkt. No. 21478, decided March 31, 1966. —The Commission's treatment of the public benefits to be obtained from the merger here is exhaustive, is based on extensive evidence, and affords a solid basis for its ultimate finding of the public interest.

2. *The Effects of Reducing Rail Competition Among Three Rail Carrier Systems to Two Rail Carrier Systems.* —The appellants charge that the Commission erred in failing to realize that where there are three competing systems which are reduced to two through a merger, competition is reduced. (Southern 28-29) But the Commission was guilty of no such fallacy. The first sentence of its discussion of competition showed its realization that the "proposed merger would result in the elimination of present competition between Seaboard and Coast Line in a six-state area." (320 I.C.C., at 163) And the Commission found that 30.9% of the Seaboard's tonnage was competitive with the Coast Line's tonnage, and that 33.4% of their combined tonnage was competitive as between them. (320 I.C.C., at 163-64) What the Commission did, however—which an administrative agency administering a "public interest" statute like § 5 can and should do, unlike a court administering a prohibitory statute like § 7 of the Clayton Act—was to view in a different light, and appraise differently, those eliminations of competition between the merger applicants where there would remain after the merger another competitive rail carrier—generally the Southern—and those where there would be none. See 320 I.C.C., at 163-64.

In the light of the effects of intermodal competition on the railroads (320 I.C.C., at 149-53, 166), the Commission clearly identified and articulated its goal; that goal was the preservation of two healthy, "balanced competitive [rail] systems" in the Southeast. (320 I.C.C., at 188) The Commission thus realized—contrary to the appellants' suggestion (Southern 23-24)—that competition could be used as a tool to further the National Transportation Policy. The Commission recognized, as had its Examiner's

Report, which it adopted, that the nature of competition in the rail industry is different from that in the manufacturing, mercantile and service industries. See Ex. Rep. fol. 153. *Cf. Pennsylvania R. Co.—Merger—New York Cent. R. Co.*, 327 I.C.C. 475, 510 (1966).

The basic competition in the railroad industry is for the high-revenue-producing long-haul traffic. That competition is not between specific originating carriers at originating points but is "route competition" for the long haul.[15] —The Commission recognized this fact of life in the railroad industry here, as it has in other rail merger cases. *Cf. Pennsylvania R. Co.—Merger—New York Cent. R. Co., supra*, 327 I.C.C., at 513. The Commission dwelt on the interlacing nature of the separate systems of the Coast Line and of the Seaboard, the distribution of their lines and other competing lines in the territory served, and the fact that a large number of points in their common territory are served by one, but not by both, of them.[16]—This is the backdrop of the necessity to unify that system in order to provide balanced competition throughout the Southern Region with the Southern.[17]—While this sort of "balanced

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[15] "Generally, the important revenue producing traffic is that which generates long hauls extending between two or more major rate territories, or are otherwise in the nature of tra continental movements. On such traffic, the through movement is handled successively by many railroads, and the competition which exists is between available routes rather than between the railroads concerned. . . . More often than not, the primary aspect of competition having bearing on the movement of important long haul traffic involves the question of which railroad is able to convince the persons responsible for the routing of the most desirable traffic, to designate the specific routes most favorable to the soliciting railroad . . . ." Ex. Rep. fol. 153-54.

[16] See 320 I.C.C., at 164-66.

[17] Thus, the Southern has always taken advantage in its advertising and promotional activities of its extensive single-carrier services. The record contains examples of Southern's advertising:

competition" approach is not permissible in a Clayton Act § 7 case (see *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963)), it is obviously permissible and essential in a § 5 proceeding before the Commission; the appellants' attack on it simply illustrates that they are persisting in the approach which this Court repudiated in its decision last Term.

3. *The Situation Within Central and Western Florida.* —The appellants claim a variety of errors with respect to the Commission's treatment of the competitive situation within central and western Florida. Essentially, it is claimed that the Commission's findings, and its appraisal and estimate of the curtailment of competition within central and western Florida, are inadequate. (Southern 30-38; Tampa 9-12)—But the Commission made an accurate estimate of the situation to be created within central and western Florida: It correctly styled it what it obviously would be, a "rail monopoly." 320 I.C.C., at 165. While it would have been possible for the Commission to have made further findings cumulative to this finding, the purpose of such findings in reiteration of the obvious, which the appellants contend for, is obscure.

What the Commission proceeded to do was to put the intramodal monopoly within central and western Florida, that would unquestionably be caused by the merger, into perspective; and then to take ameliorative steps. Thus, the

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"There's only one . . . that serves them *all*!", pointing to major South Atlantic and Gulf ports and Southern Region gateways. (Exs. H-224, H-225) As the Examiner pointed out, Southern's "routes generally serve the same terminals, and are parallel to and cross the lines of Seaboard and Coast Line, within extensive portions of the states in which they operate. Exclusive of Florida points, Southern serves practically every important point served by the Seaboard, Coast Line, and L&N." Ex. Rep. fol. 68.

Commission found that the nature of the lines of Coast Line and Seaboard was such, within central and western Florida, that the number of cities served by both of them was not great compared to the number served only by one. (320 I.C.C., at 165) Accordingly, in many cases, the merger would not operate to deprive rail shippers of any existing choice as to the originating rail carrier.

The Commission also pointed out that it was essential not to overestimate the effect of the origination point monopoly within this area, inasmuch as there were a number of interchange points with other carriers in Florida (320 I.C.C., at 165), where, to the extent through routes existed, a shipper in the central and western areas could specify an onward routing over a competitor of the Merged Carrier. The Commission pointed out the fact that in terms of the movement to the destinations at the industrial centers the Merged Carrier would be subjected to competition for the long haul. (320 I.C.C., at 166)

As a backdrop to its consideration of this situation, the Commission—which had earlier in its opinion extensively reviewed the effects of intermodal competition generally (320 I.C.C., at 149-53)—analyzed the effects of intermodal competition on the merged carrier in the area. (320 I.C.C., at 166-67; see also 320 I.C.C., at 151-53) The Commission analyzed the situation with respect to the most important of the heavy, bulkloading commodities shipped in this area, phosphate rock.[18] Here, the Commission found that al-

[18] Appellants say that the Commission should have performed a similar analysis with each of the first nine commodities carried by Coast Line and Seaboard in terms of tonnage. (Tampa 15; Southern 37) But no showing has been made that phosphate rock, the most important commodity, is not fairly representative of the situation as to the other bulk-loading commodities. This whole approach appears to be an inheritance of the view that the Commission must make Clayton Act findings, which this Court

though phosphate rock was "essentially a commodity normally handled by rail," water movements from Tampa were competitive with rail, and because of it the rail revenues on phosphate rock were being driven downwards.[19] (320 I.C.C., at 152-53) The Examiner's Report, adopted by the Commission, recites the evidence as to the movement of phosphates and other bulk-loading commodities by water from Florida points. (Ex. Rep. fol. 38) The Commission observed that: "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock." (320 I.C.C., at 153)[20]

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rejected last Term. Moreover, it is somewhat mysterious why the Commission would be safe, under the appellants' view, if it stopped at analyzing only nine commodities. Undoubtedly if the Commission had expressly analyzed nine, appellants would now cry for nineteen.

[19] Tampa itself admits that phosphate rock is "by far the single most important commodity to the maintenance, development and growth of Tampa's port." (Tampa 11) Obviously, considerable intermodal competition to the railroads on this commodity is presented by rail-water movements or truck-water movements through Tampa. Indeed, in the light of this expressed interest in its port, one may legitimately wonder whether Tampa is interested in attempting to block the merger because of its stated concern over the elimination of rail competition between the Seaboard and the Coast Line, or whether because it fears that the Merged Carrier will be able more effectively to compete for the long-haul movements with water carriage movements passing through the port of Tampa.

[20] The appellants assert that the Commission's finding that phosphate rock is normally carried by rail, and its finding that the railroads face severe competition from other modes in carrying it, are inconsistent. (Southern 37; Tampa 16) It is hard to grasp the kind of thinking that finds these two propositions inconsistent. What the Commission is saying, as even a cursory reading of the context of its remarks would indicate, is that even on the heavy, bulk-loading commodities, like phosphate rock, normally carried by rail, there is increasing intermodal competition. The findings simply and vividly demonstrate the plight of the railroads in the face of this ubiquitous intermodal competition.

Putting the rail monopoly to be created by the merger within central and western Florida in this perspective, the Commission determined to apply a set of conditions that would, notwithstanding the situation created within Florida, permit it to find that the merger was consistent with the public interest. As the Commission stated: "Absent suitable protective conditions and consideration of these [public advantage] factors, there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws. Here, however, it is clear that the benefits of this merger, when viewed in the light of the conditions hereinafter imposed, will greatly outweigh the potential injuries and hence the policy underlying the antitrust laws does not represent a barrier to its approval." 320 I.C.C., at 167.

The appellants understandably do not dwell upon the conditions ordered by the Commission, but even a brief study of those conditions—which we set forth in Appendix A—demonstrate that they were imposed for the purpose, and would have the effect, of dealing with the competitive problems in the various problem areas which the Commission recognized.

In the context of the situation in central and western Florida, the central condition is Condition 8, which requires the Merged Carrier to open and maintain through routes and joint rates with the Southern through the Jacksonville gateway. (App. A, pp. 2a-3a; App. C, p. 12a, *infra*) —In the absence of such a condition, neither the Seaboard or the Coast Line unmerged, nor the Merged Carrier, would have been required to open any through routes or establish any joint rates at Jacksonville—the principal rail gateway into Florida—which would have had the effect of

"short-hauling" them on traffic which they originated.[21] But with this condition, the Southern will be able to compete for the long haul of the traffic from Jacksonville to its ultimate destination. —The Commission and its Examiner both realized that the essential competition in the rail industry was route competition, for the long haul. (See pp. 5-6, 23-24, *supra*) Thus, as the Commission pointed out, through the imposition of Condition 8, opening the Jacksonville gateway, it was able to counterbalance the effects of the rail monopoly within central and western Florida created by the merger. (320 I.C.C., at 181, 182, 184) Accordingly, by giving the Southern access to the profitable long haul on shipments originating in central and western Florida, the Commission, through Condition 8, made competitive rail service by the Southern available for the first time to shippers in central and western Florida, and thus fulfilled its design of developing two strong, balanced, competitive systems in the Southern Region. (320 I.C.C., at 188)

Indeed, the Commission's imposition of this condition is a vivid example of the difference between an antitrust suit—to which the appellants insist on analogizing this proceeding—and a flexible administrative proceeding. Through

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[21] Because of this, the Coast Line and the Seaboard have not generally established through routes with the Southern at the Jacksonville gateway with respect to traffic originated by them in Florida. Absent an event such as the proposed merger, where the Commission's powers are more extensive through the conditioning power (*Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288 (1932)), the power of the Commission to require the opening of through routes by an originating carrier, where the effect would be to require the originating carrier to "short haul" itself, is expressly limited by the statute. §15(4), 49 U.S.C. § 15(4). The power may only be exercised upon the making of a special finding to the effect that either the short-hauling is necessary to prevent an "unreasonably long" route, or that the short-haul route "is needed in order to provide adequate, and more efficient or more economic transportation." (*Ibid.*)

the conditioning power—a power not shared by the courts in an antitrust matter—the Commission, which clearly perceived, as the District Court found, the specific problem areas in the merger, was able to devise a solution, drawn from its experience in rail transportation, that was adequate to the competitive problem.

4. *The Track Transfer Contention.*—Southern urges that the Commission erred in not conditioning the merger upon the grant of the particular self-interest project which it has pursued throughout these proceedings, that is, the transfer to Southern by the Merged Carrier of a line of its road between Jacksonville and Tampa and points south. (Southern 9, 40-43) —In essence, of course, this contention simply goes to the question of which conditions are appropriate to preserve competition for the long-haul with respect to traffic originating in central and western Florida —the trackage sale condition requested by Southern, or the Jacksonville gateway condition, and the other conditions, imposed by the Commission. Clearly, this is a question which is entrusted solely to the Commission's judgment. Southern shows no basis for the courts to second-guess the Commission's solution as to the proper remedy.

Southern contends that, inasmuch as the Commission characterized its request as "an invasion of territory" now adequately served by the applicants (320 I.C.C., at 187), the Commission's action amounted to an erroneous favoring of the private interest of the applicants over the public interest. —But the principle of noninvasion of another carrier's territory absent a positive showing of public need is one which the Act itself recognizes (See § 1(18), 49 U.S.C. § 1(18));[22] and while the Commission recognized

[22] § 1(18) came into the statute at the same time as the first special provision for mergers. Transportation Act of 1920, 41 Stat. 456, 477.

its power to impose such a condition upon a merger, despite § 1(18) (*cf. Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, 294-95 (1932)), the Commission determined not to do so since Southern's loss of traffic and revenue from the merger (subject to the gateway condition at Jacksonville) would be insignificant, and since there was no "public need for additional service" with respect to the short haul between Jacksonville and Tampa and points south. (320 I.C.C., at 187, 209) The Commission also found that the proposal, which would require the continued duplication of facilities, would "frustrate the over-all objectives of the merger." The Commission found the condition unacceptable not because of its private effect, but because it would amount to a "detriment of the public interest." (320 I.C.C., at 187) Certainly on this basis Southern has not demonstrated that the Commission exceeded its powers in its choice between the two means of ensuring that Southern would serve to offer balanced competition to the Merged Carrier on shipments originating in central and western Florida.

In an effort to generate an issue of law, Southern claims that the Commission applied an improper standard in passing on the proposed condition. It claims that the Commission should not have judged the proposed condition in terms of whether there was a "public need" for it, but simply in terms of whether it was "just and reasonable." (Southern 42-43) This is a bizarre reading of the statute. The relevant language is that: "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed [merger] transaction . . . will be consistent with the public interest, it shall enter an order approving [the transaction] . . . ." § 5(2). While under this language, the Commission must find a condition to be "just and reason-

able" before it can impose it,[23] it obviously is not under a duty to impose *every* condition that every intervenor propounds which might happen to be "just and reasonable." Railroad mergers are required to be, after all, voluntary proposals. See *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954). The statute plainly says that the Commission is required to impose conditions on merger proposals only to the extent necessary to ensure that the proposal "will be consistent with the public interest." While only those conditions which are "just and reasonable" may be imposed, it does not follow that every condition which is tendered *must* be imposed unless it is affirmatively found not to be "just and reasonable"; the Commission is required only to apply conditions to the point necessary to make the proposed transaction consistent with the public interest.[24] See 320 I.C.C., at 127. Southern's contention as to the application of an erroneous standard by the Commission is accordingly without foundation.

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[23] The passage quoted by Southern from the *Great Northern* case (Southern 43) simply says that, where the Commission determines to impose a condition, the test under § 5(2) is whether the condition is "just or reasonable," even though, absent a merger, the imposition of the same remedy might require a special finding of a sort difficult to make. *Cf. Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288 (1932). This simply tells us when the Commission may impose a condition, not when it must.

[24] Even if the standard were whether the condition was "just and reasonable," Southern has shown no prejudice from the Commission's failure to use the words "unjust and unreasonable." After all, the Commission found that the proposal "would, to a large extent, require the dismemberment of the merged company's lines, interfere with the merged company's planned economies, and in general frustrate the overall objectives of the merger, all to the detriment of the public interest." It also found that the transfer would be "primarily for the benefit of [Southern]," and "would deprive the merged company of substantial revenues." (320 I.C.C., at 187, 209-10) Clearly, this is tantamount to a finding that the proposed condition was not "just and reasonable."

5. *The Divestiture of the L&N.* —Finally, Southern contends that the Commission erred in not imposing a condition that the Merged Carrier divest itself of control over the Louisville and Nashville Railroad. Control of the L&N is now held by Coast Line through ownership of 33.69% of its stock; this stock interest would of course pass to the Merged Carrier.

The Commission considered this contention at length and considered detailed analyses of the position of the L&N in terms of the dynamics of route competition between railroads. The Southern's contention (Southern 45) that the Commission failed to analyze the degree of favoritism that would be practiced by the Merged Carrier and the L&N is baseless. First, the Commission analyzed the Coast Line's present control, and the extent—fairly minimal—to which it had historically used it to dictate routings. (320 I.C.C., at 188) The Commission extensively analyzed the restraints upon such an exercise of that control, particularly the powers of the Illinois Central and the Gulf, Mobile and Ohio, area competitors of the L&N, to effect reprisals against diversions from them to the L&N by the Merged Carrier. (320 I.C.C., at 189)

The Commission, through its administrative conditioning power, took the situation in hand. It developed this reprisal power of the Illinois Central and the Gulf, Mobile and Ohio by strengthening the position of the Southern through the Jacksonville gateway condition (Condition 8) discussed above, pp. 28-30, *supra,* and through Condition 12 requiring the merged carrier to grant the Central of Georgia (a Southern subsidiary) trackage rights between Albany and Tifton, Georgia. That would permit the Illinois Central and the Gulf, Mobile and Ohio to give the Southern the long-

haul straight through to Jacksonville[25] on southbound traffic, in reprisal against any diversionary attempts by the Merged Carrier against them, through the use of the L&N. (320 I.C.C., at 208)

The Commission, after its analysis and appraisal, concluded that, giving effect to the conditions it had imposed, the favoritism which the Merged Carrier would show the L&N would not be extensive, and that divestiture was not required. —Once again, here, the Commission used its administrative powers to ensure competitive balance. See 320 I.C.C., at 184. Southern suggests that the Commission did not realize the antitrust implications of the control of one corporation over another (Southern 45-46); on the contrary, not only did the Commission recognize this obvious fact, but it administratively provided a method whereby this relationship could be effectively kept in check.[26] Southern's contention here, too, is simply that the Commission should have imposed one condition rather than another.

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In short, as the District Court observed, the Commission here properly used the policies and tools of the antitrust laws, "to help pinpoint the danger areas" with respect to the foreclosure of competition. (FEC 14a) The Commission "estimated the scope and appraised the effects of the curtailment of competition which will result" from the proposal. *Minneapolis & St. L. R. Co.* v. *United States*, *supra*, 361 U.S., at 186; *McLean Trucking Co.* v. *United States*, *supra*, 321 U.S., at 87; *Seaboard Air Line R. Co.* v. *United*

[25] The Southern already has an excellent line between Tifton, Georgia, and Jacksonville. (320 I.C.C., at 183)

[26] The Southern also contends that the Commission applied the wrong standard in rejecting the divestiture condition. (Southern 45) For the reasons developed above, this argument is without merit. See pp. 31-32, *supra*.

States, supra, 382 U.S., at 155. It perceived the danger areas after making this estimate and appraisal; it used its administrative tools to minimize the harms to competition in these areas; and it, on the basis of substantial evidence, drew the ultimate conclusion that, balancing the benefits and the harms of the merger, the merger met the test of the public interest set forth in § 5(2) of the Act. In short, the Commission did precisely what this Court's decisions in *McLean* and *Minneapolis* said it had to do, and which this Court's decision last Term in this very case confirmed.

CONCLUSION

This merger application has already been pending before the Commission and the courts for over six years. It has been pending before the courts, at this writing, for 32 months, and already has twice had the attention of the District Court and once the attention of this Court. The contentions asserted by appellants on the issues of competition and the public interest amount essentially to an effort to try *de novo* in this Court issues which are committed to the Commission's discretion.—But the function of a court reviewing a Commission order is "limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536 (1946).

In the light of these considerations, we submit that this proceeding should at last be brought to an end and that the judgment of the District Court should be summarily affirmed. This Motion to Affirm accordingly should be granted.

Respectfully submitted,

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APPENDIX A

The Routing and Gateway Conditions

[APPENDIX XI TO THE COMMISSION'S REPORT]
[320 I.C.C., at 267-69]

1. Upon consummation of the merger, the Seaboard Coast Line Railroad Company shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Interstate Commerce Commission.

2. The present neutrality of handling traffic inbound and outbound by the applicants shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of these carriers without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships, including, among other things, interchange arrangements and switching practices, between the applicants, on the one hand, and all lines connecting with their tracks, on the other, shall be continued insofar as such matters are within the control of the Seaboard Coast Line Railroad Company.*

4. Seaboard Coast Line Railroad Company shall accept, handle, and deliver all cars inbound and outbound, loaded or empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

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* The proposed name of the Merged Carrier.

5. Seaboard Coast Line Railroad Company shall not do anything to restrain or curtail the right of industries now located on lines of the applicants to route traffic over any or all existing routes and gateways.

6. Seaboard Coast Line Railroad Company shall preserve and maintain the same schedules on the present freight trains of Seaboard and Coast Line which the merged company would continue after consummation of the merger; unless such schedules, after revision, would provide later departure times and/or earlier arrival times at junctions and gateways in such a manner that the existing cutoff times for connecting trains of other railroads would not be changed, or, would not cause or permit such connections to be delayed or broken.

7. Seaboard Coast Line Railroad and its connections shall open new routes, and maintain thereover competitive joint rates and just and equitable divisions thereof in connection with Norfolk Southern Railway Company via Wilson, N. C., via Fayetteville, N. C., and via Raleigh, N. C., on all traffic moving between (i) all stations on the Seaboard Coast Line Railroad Company and its connections south of Norfolk Southern's line, on the one hand, and (ii) Norfolk, Va., and points in official territory located in the Buffalo-Pittsburgh, eastern trunk line, and New England territories, including, Canada, on the other; provided, that this condition shall be in effect only as long as Norfolk Southern remains an independent railroad.

8. Seaboard Coast Line Railroad Company shall, as to all traffic (except traffic restricted by the terms of the existing Hardeeville-Jacksonville trackage agreements), be required to maintain, in connection with the Southern and its affiliates to and from the Jacksonville gateway, joint rates

no higher than the rates applicable over the lines of the merged company through that, or any other, gateway: Provided, however, that Southern and its affiliates will extend similar reciprocity to the merged company with respect to all traffic interchanged by Southern or its affiliates at the Jacksonville gateway.

9. At the request of Southern Railway Company, presented in writing not more than 12 months after the date of consummation of the merger authorized herein, or not more than 12 months after the effective date of any certificate of the Commission permitting abandonment by Seaboard Coast Line Railroad Company of any line of railroad directly affecting the lines described in this condition, Seaboard Coast Line Railroad Company shall cancel the existing trackage agreements under which Southern Railway operates over lines of the Atlantic Coast Line Railroad Company, between Hardeeville, S. C., and Jacksonville, Fla., and shall refrain from opposing or in any manner protesting any request by Southern Railway for permission under section 1(18)-(20) to abandon operations pursuant to the aforesaid trackage agreements.

10. At the request of Southern Railway Company, presented in writing not more than 6 months after the date of consummation of the merger authorized herein, or, not more than 6 months after the effective date of any certificate of the Commission permitting abandonment by Seaboard Coast Line Railroad Company of any line of railroad directly affecting the lines described in this condition, Seaboard Coast Line Railroad Company shall cancel the existing trackage agreements under which Southern Railway operates over lines of the Atlantic Coast Line Railroad Company between Selma, N. C., and Pinners Point, Va.;

and shall refrain from opposing or in any manner protesting any request by Southern Railway for permission under section 1(18)-(20), to abandon operations pursuant to the aforesaid trackage agreements.

11. Seaboard Coast Line Railroad Company shall be required to transfer to the Southern Railway Company, by sale or long-term lease, or the grant of trackage rights, or a combination thereof, a line of railroad from a connection with the Southern Railway in Jacksonville to the mill of St. Regis Paper Company at Quinlan, Fla., upon such terms as the carriers may agree or, in the event of their disagreement, upon such terms as the Commission may, after subsequent hearing, find to be just and reasonable, all subject to the approval of the Commission upon the filing of an appropriate application.

12. Seaboard Coast Line Railroad Company shall be required to grant trackage rights to the Central of Georgia Railway Company over the track of the merged company between Albany and Tifton, Ga., upon such terms as the carriers may agree, or, in the event of their disagreement, upon such terms as the Commission may, after subsequent hearing, find to be just and reasonable, all subject to the approval of the Commission upon the filing of an appropriate application: Provided, however, that this condition shall be null and void unless the Central of Georgia Railway Company requests such trackage rights within 1 year from the date of consummation of the merger herein authorized.

13. Any party or person having an interest in the subject matter herein, at any future time, may make application for such modification of the conditions prescribed as part of the authorization herein, or any of them, as may be

required in the public interest; and jurisdiction will be retained by the Commission to reopen the proceeding herein on its own motion for the same purpose.

14. The Commission will retain jurisdiction for a period of five years following the date of consummation of the merger to permit the filing of petitions by the carriers by railroad specified in the report herein, for inclusion in the transaction. The Seaboard Coast Line Railroad Company will be required to negotiate in good faith with respect to the proposals for inclusion presented to it by such petitioning railroads and to cooperate to the fullest extent in the compilation of an adequate record to provide a basis for the required determination by this Commission as to whether such transaction would be consistent with the public interest. In the event the parties are unable to agree, and the Commission after hearing concludes that the transaction would be consistent with the public interest, it will issue an order directing the Seaboard Coast Line Railroad Company to include the petitioning railroad upon such terms and conditions as the Commission finds to be just and reasonable.

APPENDIX B

The Commission's Order of December 2, 1963

At a Session of the

INTERSTATE COMMERCE COMMISSION
held at its office in Washington, D. C.,
on the 2nd day of December A.D. 1963.

Finance Docket No. 21215

SEABOARD AIR LINE RAILROAD COMPANY—
MERGER—ATLANTIC COAST LINE RAILROAD
COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD COMPANY
BONDS

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, oral argument having been heard, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner is hereby referred to and made a part hereof:

It is ordered, That the motions of several intervenors that the application be dismissed, be, and they are hereby, denied;

It is further ordered, That the petition of Florida East Coast Railway Company for further hearing be, and it is hereby, denied;

It is further ordered, That subject to the terms, conditions and modifications referred to in the aforesaid report, (a) the merger of the properties and franchises of the Atlantic Coast Line Railroad Company into the Seaboard Air Line Railroad Company (name to be changed to Seaboard Coast Line Railroad Company) for ownership, management and operation; (b) the acquisition by the latter of sole or joint control of carriers subsidiary to or affiliated with the Atlantic Coast Line Railroad Company through ownership of stock or lease; (c) the acquisition by the Seaboard Air Line Railroad Company, as successor in interest, of trackage rights and joint use of certain lines of railroad now used by the Atlantic Coast Line Railroad Company; (d) the transfer of the outstanding motor carrier operating rights of Atlantic Coast Line Railroad Company to the Seaboard Air Line Railroad Company pursuant to the approved plan of merger; and (e) by virtue of such merger, the acquisition of control of Seaboard Air Line Railroad Company, the surviving corporation, by Atlantic Coast Line Company and, in turn, the acquisition of indirect control of Seaboard Air Line Railroad Company by Mercantile-Safe Deposit and Trust Company, be, and they are hereby, approved and authorized.

It is further ordered, That (a) the issuance by Seaboard Air Line Railroad Company of 3,839,345 shares of $20 per share par value common stock and scrip certificates representing fractional shares in conversion of outstanding capital stock of the Atlantic Coast Line Railroad Company pursuant to the aforesaid plan of merger, and (b) the assumption by the said Seaboard Air Line Railroad Company of the obligations and liabilities of the Atlantic Coast Line Railroad Company existing on the date of the merger, including obligations of companies subsidiary to or affiliated with the latter, which are contingently guaranteed either

solely by Atlantic Coast Line Railroad Company, or jointly with other guarantors, upon the terms and for the purposes described, be, and they are hereby, authorized;

It is further ordered, That (a) the proposed Modification Indenture of the Atlantic Coast Line Railroad Company to the First, Second, Third and Fifth Supplemental Indentures, dated March 1, 1950, June 30, 1952, July 1, 1952, and March 1, 1955, respectively, to its General Mortgage dated March 1, 1950, modifying the sinking fund requirements with respect to its Bonds of Series A, B, C and D, in the manner and form set forth in the application filed in Finance Docket No. 21254 and in the proposed Modification Indenture, all as described in the aforesaid report, be, and it is hereby, authorized, contingent upon and concurrent with the consummation of the merger herein authorized, and (b) the Commission's Orders of May 26, 1950, in Finance Docket No. 16961; April 10, 1952, in Finance Docket No. 17667; June 23, 1952, in Finance Docket No. 17791; and March 25, 1955, in Finance Docket No. 18874 be, and they are hereby, modified accordingly;

It is further ordered, That, except as herein authorized, the aforesaid securities shall not be sold, pledged, repledged, or otherwise disposed of by Seaboard Air Line Railroad Company, or by the Atlantic Coast Line Railroad Company, or by the merged company, unless or until so ordered or approved by the Commission;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities or dividends thereon on the part of the United States;

It is further ordered, That the merged company shall report concerning the matters involved herein in conformity

with the orders of the Commission, Division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That the merged company, when establishing changes in tariffs, rates and charges as may be required in effectuation of transactions approved herein may do so upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and shall in schedules making such changes refer to this order by date and docket number;

It is further ordered, That if the authority herein granted is exercised, the merged company shall submit for the consideration and approval of the Commission three copies of the journal entries required to record the transactions authorized herein;

It is further ordered, That this certificate and order shall become effective from and after 30 days from the date of service;

And it is further ordered, That, if the authority granted in the certificate herein is not exercised within one year from the effective date of this order, it shall be of no further force and effect.

By the Commission.

Harold D. McCoy
Secretary

(SEAL)

APPENDIX C

The Commission's Order of March 4, 1964, on Petitions for Reconsideration

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March A. D. 1964.

Finance Docket No. 21215

SEABOARD AIR LINE RAILROAD COMPANY—
MERGER—
ATLANTIC COAST LINE RAILROAD COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD COMPANY
BONDS

Upon consideration of the record in the above-entitled proceeding, of the petitions, filed January 13, 1964, on behalf of (a) Union Bag-Camp Paper Corporation, (b) Florida East Coast Railway Company, (c) Gulf, Mobile and Ohio Railroad Company, (d) Illinois Central Railroad Company (including request for oral argument), (e) Central of Georgia Railway Company and Savannah & Atlanta Railway Company, (f) Southern Railway Company et al., and (g) Railway Labor Executives' Association, for reconsideration of the report and order of December 2, 1963; and of the reply of applicants, filed February 3, 1964; and

It appearing, That the employee-protective conditions set forth in *Southern Ry. Co.—Control—Central of Georgia*

Ry. Co., 317 I.C.C. 557, as supplemented in 317 I.C.C. 729, were imposed herein; that on February 27, 1964, the said conditions were clarified; and that such conditions as clarified are, and continue to be, applicable to this proceeding;

It further appearing, That, subject to certain restrictions, the Southern Railway Company operates over a line of the Atlantic Coast Line Railroad Company between Hardeeville, S. C., and Jacksonville, Fla., via Savannah, Ga., under trackage agreements with the said Atlantic Coast Line Railroad Company; that the said trackage agreements, as interpreted by the parties thereto, may preclude the Southern Railway Company from interchanging freight traffic at Savannah with either Central of Georgia Railway Company or the Savannah & Atlanta Railway Company in connection with movements to, from, or through the Jacksonville gateway;

It further appearing, That Condition 8, relating to the opening of the Jacksonville gateway by the merged company should be clarified and modified to require the Seaboard-Coast Line Railroad Company to provide the Central of Georgia Railway Company, the Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern Railway Company with the right to interchange freight traffic with the Southern Railway Company at Savannah in connection with movements to, from or through the Jacksonville gateway via the Hardeeville-Jacksonville segment;

And it further appearing, That, except as the petitions are granted for the purpose of the modification herein approved, the material matters set forth in the petitions have been considered by the Commission and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained

of by petitioners, that no showing has been made warranting reconsideration of the said decision, and that further oral argument is unnecessary:

It is ordered, That the proceeding be, and it is hereby, reopened for reconsideration solely for the purpose of modifying Condition No. 8 of the routing and gateway conditions; and that the said condition be, and it is hereby, modified as follows:

Condition No. 8, after the word "gateway" at the end of Condition No. 8, delete period, insert comma in lieu of period, and add the following:

and, *Provided further* that the Seaboard Coast Line Railroad Company shall take such further action as may be necessary to permit the interchange of freight traffic between Southern Railway Company and Central of Georgia Railway Company, Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern at Savannah in connection with movements to, from, or through the Jacksonville gateway by the Southern Railway Company under existing trackage arrangements permitting operations by that rail carrier between Hardeeville and Jacksonville over a line of the Seaboard Coast Line Railroad Company.

It is further ordered, That in all other respects the said petitions be, and they are hereby, denied.

And it is further ordered, That the order of December 2, 1963, as herein modified, shall become effective from and after 35 days from the date of service.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)